A REVIEW OF THE

ACCESS TO INFORMATION AND PRIVACY LAWS

AS APPLIED TO

THE DEPARTMENT OF EXTERNAL AFFAIRS

AND

SUGGESTED CHANGES TO THE

ACCESS TO INFORMATION AND PRIVACY LAWS

BY

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PART I

A REVIEW OF THE

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BACKGROUND

My task was to review the practises and procedures of the Department of External Affairs in administering its responsibilities under the Access to Information Act and the Privacy Act, referred to in this report as the "ATIP Law", in order to:

- consider if departmental responses could be adjusted to best conform to the intent of the Law;

- obtain from departmental experience suggestions that could alter the Act to better serve the Canadian people.

It is best to start by pointing out that the Privacy Act has not been invoked to any extent in respect of External Affairs. I was given to understand that the ratio of privacy to information access requests has been about 15 per cent to 85 per cent. Nevertheless, with an eye to the future, it is important to remember that the two Acts were placed within the same framework and should be read together. Many of the clauses dealing with exemptions, administration, complaints, reviews, appeals and so on, are couched in identical language. A major reason for this was to avoid the experience of the United States where a variety of judicial precedents placed privacy matters in direct conflict with freedom of information applications, creating great confusion.

So it was a desirable objective that those involved in administering the Acts, as well as judges engaged in interpreting the law, have a vehicle making it easier to reconcile the two principles.

In preparation for the writing of this report, I examined a number of departmental access application files. The Access Co-ordinator and his staff were most helpful in placing these files at my disposal and in many other ways.

I also had interviews with those involved in using the ATIP Laws, read departmental and other reports, including those of the Information and Privacy Commissioners, and had discussions with various officials. In addition, I reviewed the parliamentary practise of written Questions for the Order Paper, Starred Questions, and the operation of the House of Commons' Oral Question Period.

Finally, I studied the American and Australian experiences and laws dealing with open government.

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The principle of freedom of information has received some recognition in international law. World War II led to various declarations of human rights. These were duly proclaimed with great solemnity in the hopes they would serve as a brake on the excesses of future rulers, and make ordinary people aware of their rights.

A review of the various charters makes it clear there was an intention to give citizens the right to seek and receive information.

Thus, Article 10 of the Universal Declaration of European Rights, provides that:

> . Everyone has the right to----seek, receive and impart information.

Article 19 of the International Convenant on Civil and Political Rights, also declares that:

> . Everyone has the right to-----seek, receive and impart information.

Article 10 of the European Convention of Human Rights is the most succinct of the several international declarations of the right to know.

> 1) "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information----------.
>
> 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society; in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime; for the protection of health or morals; for the protection of the reputation or rights of others; for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

The right to receive information, set against a sensible and workable framework of conditions, has received a great deal of attention and some action from the Commission of Human Rights and the Parliamentary Assembly in Strasburg of the Council of Europe.

Some years ago this led to the establishment of a Committee of Experts, which met at Graz, Austria, under the leadership of the newly-appointed Austrian Foreign Affairs Minister, Mr. Pahr. Representing many member countries of the Council of Europe, this committee accorded honorary status to several other countries, including Canada.

At the conclusion of the two-day meeting, the committee, staffed by the Human Rights Commission bureaucracy, passed a strongly-worded resolution, unanimously accepting the principle of freedom of information, and urged its member states to provide this right for their citizens. Eventually this led to related action in the committees of the Assembly at Strasbourg and, ultimately, to the Assembly itself.

This background material has been included as the basis for the argument that the Canadian External Affairs Department should have been a strong and active supporter of the principles set down in our law. Certainly, at the conclusion of World War II, and thereafter, Canada was a respected and heeded voice in international issues, particularly those dealing with human rights, and ought therefore to have been in the vanguard of support for this principle. But, in truth, the concept of freedom of information has not had a very friendly treatment in External Affairs' circles.

There are some notable exceptions. The commissioning of this report is a clear example of support from the Secretary of State for External Affairs for a good and workable law.

I also have commendation for the activities and staff of the Office of the Access and Privacy Co-ordinator. And there are other departmental personnel, including some of the legal officers, who have faithfully and diligently done their best to fold the principles of the ATIP Law into the workings of the department.

But, by and large, I must rate the attitude of the department's senior management as quite disappointing.

From 1979, when the appearance of Bill C-15 first indicated the federal government had serious intentions of legislating an era of open government, the response of these people has been largely negative, as was demonstrated in the overt and covert skirmishings during the discussions and committee meetings marking the various stages of drafting the bill. This antagonism was also displayed in internal considerations of the department as well as

in the inter-departmental groups that met formally and informally to discuss the bill.

There was nothing sinister or conspiratorial about this. It was simply a natural reaction of a government agency which, since its inception, has had no bias for openness, but rather a natural instinct to hold its cards under the table; in short, a department which has been little affected, either domestically or internationally, by the various movements for freedom of information.

Despite this, I am able to remark on the work of the department's Access and Privacy Co-ordinator and his staff. A senior officer of long service both in Canada and abroad, the Co-ordinator has been able, in most instances, to balance his departmental career and associations with the rather revolutionary responsibility of applying the Access and Privacy Laws.

The Secretary of State for External Affairs, as head of the institution, has, under the ATIP Law, some very important administrative and quasi-judicial functions. Many of these are in fact delegated to the Co-ordinator, who, I believe, has recognized this and tried to proceed accordingly.

ACCESS TO INFORMATION

It would be useful at this point to summarize certain of the functions delegated to the Co-ordinator under the Access to Information Act.

- A decision can be made to transfer a request to another institution with a greater interest. (Section 8)

- A decision can be made to extend the time limits for responding to a request. (Section 9)

- A decision can be made in regard to fees to be charged to an applicant. (Section 11)

Sections 13 to 26 involve exemptions that may be either mandatory by prohibiting disclosure, or that allow the head of an institution the discretion to grant or withhold an application for a record.

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In deciding whether one or more of these exemptions apply, certain factual determinations have to be made, based on hard evidence.

- The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could be reasonably expected to be injurious to the conduct by Canada of federal-provincial affairs. (Section 14)

- The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities. (Section 15)

- The head of a government institution may refuse to disclose any record requested under the Act that contains information the disclosure of which could reasonably be expected to threaten the safety of an individual. (Section 17)

Sections 19 and 20 attempt to deal in a precise way with certain personal and third-party information. Section 20 must be read with Section 28, that requires the head of the institution to consider any representations made by a third party before disclosing information that affects such a party.

The Act does not invest the head of the institution with any arbitrary right to make decisions. Instead there is a statutory requirement to make a finding of fact, then apply the appropriate section and determine if an application is subject to an exempting clause, thus bringing it under a rule of law.

The responsibility does not end there. If the exemption is of the permissive kind, it is still up to the head of the institution to decide whether to exercise the discretion in favour of disclosure.

There is another issue to consider:

- In any proceeding before the Court

> arising from an application under ss. 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act, or a part thereof shall be on the government institution involved. (Section 48)

This clause fixes the burden of proof against the government in respect to appeals to the Federal Court, under the sections referred to.

The head of the institution would be wise to keep this strict standard in mind when weighing the facts prior to making a judgment. If the institution is brought before the Federal Court to defend its ruling, it will be on much safer ground if that ruling took into account the onus of proof clause.

EXTERNAL AFFAIRS

In 1983 the ATIP Law came into general operation. For the purpose of providing guidance and instructions, the Treasury Board issued guidelines which were of general application to all departments and agencies.

For example, the Office of the Access and Privacy Co-ordinator was called into being by Treasury; it was not established by the Act. The guidelines also set out an extensive explanation and interpretation of the different clauses of the ATIP Law. Some of these suggested rulings were sound, but some are doubtful and may not survive challenge in court.

The Department of External Affairs more specifically came under the direction of its internal guideline dated June 1983, part I of which is entitled: "Policy and Guidance for Responding to Requests for Access to Records Under the Control of the Department."

While this guideline does not have the force of law, it is, for all practical purposes, the bible by which the department administers the ATIP Law. There are some notable exceptions:

On page 2 we read:

> The provisions (of the law) are of far-reaching significance as they fundamentally change the legal framework under which government institutions have operated in the past.

And on page 3 this appears:

> It should be noted in particular that embarrassment to the government or to individuals is not a reason for exempting information under the Act.

I am afraid that some officers either skipped these sections or read them and promptly forgot them.

A clear source of difficulty in fulfilling the intent of the ATIP Law is summed up in the following paragraph from page 4 of the guideline:

> A specific recommendation will be required from the responsible division concerning the releasability of the information requested. Also if a document is considered exempt, either in whole or in part, or the responsible division considers the document should be cleared with a foreign or provincial government or another department before it is released, the division must make a recommendation to this effect and clear it at an appropriate level, at least Assistant Under Secretary.

It is indeed necessary to consult with the division or unit most closely concerned with the subject matter of the request. But surely, objectivity requires that the decision-making process in response to the request be established elsewhere.

Yet all too often this does not happen. In most cases the requested records, after being retrieved, end up with divisional management who in the course of time (usually too much time) make their recommendations.

The climate for disclosure is mainly antagonistic particularly in respect of applications from the media, which comprise the majority of requests and are regarded with suspicion as coming from hostile sources, with the end result being a critical story.

The trend has been to strongly recommend against disclosure, or for the records to be so severed as to be useless to the applicant.

And I repeat, in many cases, these records have been held far too long with the intention and result of discouraging the applicant.

The recommendation that too often emerges, after several weeks of hatching, reads something like this: "These records are exempt under the following sections of the Act-----. Those records not totally exempt should be severed. We are also of the opinion that a substantial amount will be required for fees."

There are, of course, exceptions to this pattern. But it emerges often enough to appear to be policy at divisional levels.

These divisional recommendations are strongly-worded, powerfully fought-for and supported by top management, and thus difficult to overturn.

What we have basically is a situation where one party to a dispute is actively involved in the functions of a court of first instance, which rules on the dispute.

Many departmental officials are convinced that the ATIP Law is not in the best interests of External Affairs, and feel they should not have to support it. And while the law cannot be openly breached, it can well be avoided.

I will be making recommendations at the end of this report. But it might be well, at this point to analyze this unnecessary reaction to the public's statutory right to access to government records.

I say unnecessary because there is not now, nor has there ever been, a denial of the necessity to prevent disclosure of certain kinds of records in the interest of good government. This was spelled out in the national debates on the issue and is clearly reflected in the terms of the Act.

Admittedly, in the final course of a dispute, the judgment of the court has been substituted for that of the government, but this is a phenomenon frequently found as a basic characteristic of our type of democracy. So the opponents of open government should have been able to accept the law, if not with great enthusiasm, at least with dignified acquiestence.

Instead we are faced with a state of mind which, because of training and tradition, simply cannot come to terms with the ATIP Law.

The Americans have attempted to deal with this situation by providing a penalty for "arbitrarily and capriciously withholding information". I do not believe this threat has worked in the US and it is even less likely to be effective in Canada, if for no other reason that it would be almost impossible to prove. In fact, my many

years experience at the bar has brought me to the conclusion that sanctions are never a remedy for persuading people to change their minds in such circumstances.

I strongly suspect many of those involved will never alter their points of view and it will take the emergence of a new breed of officer, trained in the philosophy and advantages of open government, before there will be a real disposition to fully accept the law.

Some time ago I came into possession of an internal memorandum by a public servant that included a closely-reasoned account of the dangers of government by secrecy:

> "I am increasingly coming to the conclusion that the only way to assure the circulation of information within the bureaucracy is through an open information policy which would involve large-scale public disclosure, quite apart from the civil rights arguments.
>
> "The control of information to serve the self-perpetuating ends of bureaucractic institutions has reached the point where government's ability to respond to any set of external pressures is severely limited.
>
> "Communication within the bureaucracy has all but broken down."

I point with keen approval to these statements, and I believe there are many like this in the ranks of government service, but not enough of them occupy the right chairs.

FEES

Some attention has been focused on the issue of costs and fees, much of it related to the vexatious problem of fee waivers.

This is dealt with by Section 11(6) of the Act:

> The head of a government institution to which a request for access to a record is made under the Act may waive the requirement to pay a fee or other amount or part thereof under this section or may refund a fee or other amount or a part thereof under this section.

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It was hoped this clause would permit fees to be waived if the record sought dealt with matters of public interest. Unfortunately, the drafters failed to outline the conditions for waiver and, encouraged by Treasury Board, in practise waiver applications are rejected. Virtually all waiver requests have been made by the media and no doubt this has had some influence on the negative decisions.

I hold no brief for or against the press. But as a major link between government and the people, they deal with much the public has to be informed of.

It is relevant to recall that when the ATIP Law was unveiled at the National Press Building with the usual fanfare, a press gallery member asked the attending ministers if government intended to publicize the law and the action to be taken under it. The answer came back -- the government had no plans to do so, but surely, this was the media's job.

PARLIAMENT AND THE ATIP LAW

Before the ATIP Law came into effect, government information was circulated by press releases, reports, manuals and, of course, the time-honoured but demeaning method of leaks.

There was also the parliamentary system of Written Questions on the Order Paper, Starred Questions, and the daily Question Period.

Despite the obvious differences between the parliamentary and access law systems, I find it useful to compare the two.

Thousands of questions are written and appear on the Order Paper in the House of Commons each session, covering all departments and agencies. Many are answered, although the government finds ways of avoiding a reply to those it doesn't want to deal with. Many die on the Order Papers. It often takes months to deal with certain of them. From time to time grave concern is expressed by government spokesmen for the "poor taxpayer" who has to foot the bill for this process.

Many of the questions are lengthy and complex, involving a great deal of record examination and, as always in the political world, there are questions with a political bias. The situation is not dissimilar to that of the application for access under the ATIP Law.

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Yet, weekly in a parliamentary session, hundreds of issues are canvassed, departmental files are closely scrutinized, and a great deal of data is effectively made available for ministers' briefing books for the daily ritual of Question Period.

The comparison may not be altogether fair. But it does illustrate that the resources of any department can be mobilized quickly and efficiently to provide information where there is a will to do so and the ability to command!

Having monitored the House of Commons for nearly 25 years, I have the distinct impression that the casual approach adopted in responding to Order Paper questions has been the model for government reaction to the ATIP Law. My impressions are based on the kinds of questions asked, the answers and the time element for replies.

At the time of my recent inquiry, I noted the guidelines covering the vetting of questions for the Order Paper were proposed some years prior to 1983. This being so, M.P.'s are much more restricted in what they can ask as compared with ATIP Law users...which possibly explains why more M.P.'s and senators are turning to the ATIP Law.

CONTRACT PERSONNEL

Subsequent to undertaking this report, I was asked to review the utility of the contract program with retired foreign service officers to screen departmental files in connection with 1) formal ATIP Law requests and 2) the ongoing retirement of departmental files to the Public Archives.

The program was initiated in June 1983 under the following External Affairs guideline (page 4)

> "It is anticipated that requests requiring detailed examination of a large volume will be handled by a number of experienced review analysts. Most of them, in the initial phase at least, will be retired officers of the department, as constituted at present, who will be responsible for identifying material that might be exempt under the provisions of the Act."

These consultants have held high rank in the department, some at the head-of-mission level, during their period of service. I was given to understand that all had

served with distinction and are particularly knowledgeable on various aspects of departmental activity. They have been security screened, and, as many have retired in the Ottawa area, are available.

Granting all these factors, and accepting these officers are of impeccable character, there still remains an important consideration. Will there be absolute impartiality in a dispute between the department and an outside request for disclosure?

I have already indicated my view that the head of an institution is required to act in a quasi-legal manner in making various determinations under the law, and when doing so, to keep in mind the onus for refusing to disclose a record.

It follows that those who on his behalf examine records to decide as to their exempt status, severability, injury, public interest and so on, must do so with this principle in mind and should remember the caution uttered by A.C.J. Jerome in the Maislin case, as included in the head note:

> "Since the basic principle of the Act is to codify the right of public access to government information, access should not be frustrated by a court, except under the clearest grounds, with doubt resolved in favour of disclosure."
>
> N.B. - for court, read, head of an institution.

The ideal staffing arrangement for the department's access office would have been the recruitment, under the leadership of the Co-ordinator, of suitable people from outside the department. The terms of the competition would, in the primary sense, be related to the ATIP Law.

However, I am instructed that at this point, it is quite unlikely there are appropriations voted for enough new positions to replace the existing system.

It might be possible to add to the present pool of ex-service officers with personnel who have training in information and privacy issues. But it seems as if the present system of using consultants, as and when required must continue.

I would recommend however, the preparation of a manual of instructions, explaining the true pith and substance of the Act, and summarizing the existing case law, and

emphasizing the design of Parliament in placing the burden for refusing disclosure on the institution, so that all consultants can adopt a responsible and objective attitude in enabling the head of the institution to serve as a court of first instance.

If the Canadian experience follows that of the United States, we can expect the amount of work to increase as public awareness of the law grows. I would therefore strongly recommend that as soon as funds are available the permanent staff of the Access and Privacy Coordinator's Office be increased with appropriate personnel, and the use of temporary staff be discontinued.

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RECOMMENDATIONS

1) The ATIP Law guidelines issued by the department should be withdrawn and replaced by new instructions. However, this should await the result of the statutory hearing before the House of Commons' Standing Committee charged with reviewing operations under the ATIP Law. The guidelines should include a summary of the various findings by the Information and Privacy Commissioners, as well as a review of jurisprudence developed by the federal court, and an analysis of these decisions by legal counsel specializing in the ATIP Law.

2) Departmental authority for proceedings under the ATIP Law should be centralized with the Office of the Co-ordinator. Records should be retrieved by praecipe from the Co-ordinator. Initial recommendations for action should be made by the Office of the Co-ordinator with suitable consultation with the appropriate division. Responsibility for recommendations in such problem areas as exemptions, severance, exclusions, time limits and fees should rest squarely with the Co-ordinator.

3) The Co-ordinator should report directly to the Under Secretary.

4) All time-limit extensions should be based on detailed reasons, which should be endorsed on the record.

5) There should be periodic departmental discussion groups or forums, attended by selected management personnel with participation from outside sources, i.e., legal experts, commissioners, people involved in frequent access requests, academics, and others with a knowledge of or concern with the ATIP Law.

6) It would be useful if the Secretary of State for External Affairs, as the head of the institution, were to issue a strong directive requiring full compliance with the law, and inter alia, pointing out that the law is primarily for the benefit of the public, but has a valuable side effect of generating a greater knowledge of departmental operations and therefore could bring about greater efficiency through better understanding.

PART II

SUGGESTED CHANGES TO THE

ACCESS TO INFORMATION AND PRIVACY LAWS

ACCESS TO INFORMATION ACT

Section 2 -- Purpose of the Act

1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

2) This Act is intended to complement not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

This may be considered minor, but it goes against the grain to read this sort of fluffery in an act dedicated to the propagation of truth about government. The ridiculous assertion that before the introduction of the Act, the government ever released information it didn't want released, taints the whole process. Prior to 1983, if the government did not want the public to be informed, then the public remained in ignorance.

I suggest it would be more compatible with reality to use the following as a preamble:

> Whereas the people of Canada have a political right to be informed by their government concerning the public business that they may preserve and protect the democratic principles of the constitution.....

Section 5 -- Information about Government Institutions

1) The designated Minister shall cause to be published on a periodic basis not less frequently than once each year, a publication containing

   a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

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b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

2) The designated Minister shall cause to be published at least twice each year, a bulletin to bring the material contained in the publication published under subsection (1) up to date and to provide to the public other useful information relating to the operation of this Act.

3) Any description that is required to be included in the publication or bulletins published under subsection (1) or (2) may be formulated in such a manner that the description does not itself constitute information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a records requested under this Act.

4) The designated Minister shall cause the publication referred to in subsection (1) and the bulletin referred to in subsection (2) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access thereto.

In my opinion this clause unnecessarily limits the information that should be published automatically. I would therefore suggest the following be inserted as part of section 5:

5A (1) The head of an institution shall cause to be promptly published and offered for sale to the public any manual which has been prepared by that institution whether before or after the commencement of this Act, and issued to officers of the institution, and which contains the following information:

a) interpretations of the provisions of any enactment or scheme administered by the institution where those interpretations are to be applied by, or are to be guidelines for, any officer

i) who is determining any application by a person for a right, privilege or benefit that is conferred by any such enactment or scheme;

ii) who is determining whether to suspend, revoke or impose new conditions as a right, privilege or benefit that is conferred by any such enactment or scheme;

iii) who is determining whether to impose an obligation or liability on a person under any enactment or scheme;

b) instruction to, or guidelines for, officers of the institution on the procedures to be followed, the methods to be employed, or the objectives to be pursued in the administration or enforcement by such officers, of the provisions of any enactment or scheme administered by the institution where any member of the public shall be directly affected by any such administration or enforcement.

2) In publishing a manual, referred to in 5A (1), the institution may delete from that manual any record which the institution is entitled to refuse to disclose under a provision of this Act.

3) If a request is made for a document containing a record, but if a deletion is made, the institution shall cause to be entered in the published copy of that manual a statement that a deletion has been made, the nature of the record which has been deleted and the provision of that Act under which the institution is entitled to refuse to disclose the document containing the record.

5B (1) Without limiting the generality of this section, each institution shall cause to be made available in accordance with this Act, any record brought into existence after the date on which this Act came into force, and contains any of the following items of information:

a) an interpretation, instruction or guideline referred to in 5A (1) (a) or (b), which has been issued to officers of the institution other than in the form of a manual;

b) a statement of policy or substantive rule which has been adopted by the institution

i) whether or not that statement or rule is contained in an internal memorandum of the institution, or in a letter addressed by the institution to a named person; and

ii) which may affect members of the public in the administration or enforcement by the institution, including an enactment or scheme under which the institution may impose any obligation or liability upon a person.

5C (1) Each institution shall cause to be kept and either published and copies offered for sale to the public, or made available for inspection and copying by the public, at an office of the institution, at a government office, or at a public library, in each capital of a province or territory, an index of all records referred to in this section which are not published, either separately or in a manual containing other material, and copies offered for sale to the public. Any such index shall

a) contain a description of each such record or, if there are large numbers of such records containing identical subject matter, of each class of records, sufficient to enable a person to frame an identifiable request for that document;

b) apply to all such records except to the extent that a record cannot be indexed without the disclosure of information which an institution would be entitled to refuse to disclose if that information were contained in a record for which a request is made;

c) be supplemented at least once each six months with a list of records which have been brought into existence since the index was prepared or was last supplemented.

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5D (1) Without limiting the generality of this section, a statement or rule shall be deemed to be adopted by an institution

a) if it has been adopted by an officer of the institution who is authorized by the nature of his or her duty to adopt any such statement or rule of the institution;

b) if it has been communicated in writing by an officer of the institution to a member of the public as the advice or opinion of the institution.

Section 9 -- Expansion of Time Limits

1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution, or

b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit

by giving notice of the extension and the length of the extension to the person who made the request, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

I would suggest that additional time limits following the first 30-day extension period be only made on direction by a judge.

I recognize that some access requests are complex, lengthy and ill-prepared, needing much unnecessary time searching for and preparing material. Nevertheless, a 60-day time period (involving 42 to 43 working days) should be ample under most circumstances. Requests needing additional time involve either an unusual situation (which warrants an order) or are a stalling device, which would be caught by the above proposal.

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Section 11 -- Fees

1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

   a) at the time the request is made, such application fee not exceeding twenty-five dollars, as may be prescribed by regulation; and

   b) before any copies are made, a reasonable fee, determined by the head of the government institution that has control of the record, reflecting the cost of reproducing the record or part thereof.

2) The head of a government institution to which a request for access to a records is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

3) Where a record requested under the Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

   a) give written notice to the person of the amount required; and

   b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

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6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

This section needs attention in several respects, notably to the question of photocopying costs and fee waiver, covered by section 11(6). I suggest that the Standing Committee give some thought to outlining the basis on which fees should be waived.

My proposal to resolve this situation is to replace subsection 11(6) with the following:

6 - I) Records may be furnished without charge or at a reduced charge where the head of the institution determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily affecting the general public.

6 - II) In determining whether the information can be considered as primarily affecting the general public, the head of the institution shall consider:

a) the size of the public to be benefited;

b) the significance of the benefit;

c) the usefulness of the material to be released;

d) the likelihood that tangible public good will be realized;

e) other factors bearing upon the appropriateness of public payment.

Section 13 -- Information Obtained in Confidence

1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

a) the government of a foreign state or an institution thereof;

b) an international organization of states or an institution thereof;

c) the government of a province or an institution thereof;

d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government organization or institution from which the information was obtained

a) consents to the disclosure; or

b) makes the information public.

Section 13 deals with confidential information from government. In my opinion, there should be a clear distinction drawn between foreign governments and provincial governments and their offspring. I suggest that Section 14 more than adequately protects the twisting vagaries of federal-provincial relationships. Considering the thousands of yearly negotiations at various federal-provincial levels, sub-clauses (1)(c) and (1)(d) open too many gates to too many members of the bureaucracy, and should both be deleted, or at least subjected to a public interest test, i.e., the right to withhold disclosure should not apply if the public interest in disclosure is greater than the public interest in concealing the facts.

Section 19 -- Personal Information

1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in Section 3 of the Privacy Act.

2) The head of a government institution may disclose any record requested under this Act that contains personal information if

a) the individual to whom it relates consents to the disclosure;

b) the information is publicly available; or

c) the disclosure is in accordance with section 8 of the Privacy Act.

There has been a tendency to overload this section as a basis for an exemption claim, which is usually advanced when all else fails, or is added as a spare to other claims. I have the feeling that protection of an individual is usually secondary to the sanctity of departmental records.

It is indeed proper in this age when privacy is so often and easily invaded, to ensure the Act protects the individual and is not used as a means of breaching personal privacy without consent. But there must be a strict construction according to the rules of interpretation of statutes, and not at the whim of officials.

Further, those who drafted the ATIP Law, envisioned circumstances where the rights of the individual and his or her privacy must yield to the needs of the state. Subsection 2 of section 19 refers to section 8 of the Privacy Act as a ground for allowing disclosure, and section 8(1)(m) of the Privacy Act authorizes the head of an institution to disclose information when "...the public interest in disclosure clearly outweighs any invasion of privacy...".

While section 8 of the Privacy Act has been made applicable to the Access Act, this may not be an adequate enough measure. It might well be made a specific part of section 19 of the Access Act, that this question of public interest be taken into account when making decision to release personal information.

Section 20 -- Third Party Information

1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

   a) trade secrets of a third party;

   b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

   c) information the disclose of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party; or

d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of a product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b) (c) or (d) if such disclosure would be in the public interest <u>as it relates to public health, public safety or protection of the environment</u> and, if such public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

There is also a propensity to abuse the use of section 20 as an exemption claim. This could be readily dealt with by a simple amendment to sub-clause 6, through the deletion of the following:

> as it relates to public health, public safety or protection of the environment.

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Thus much of the exemption under section 20 would require the head of the institution to be on notice to ensure that the proper balance of public interest is preserved.

Section 54 -- Information Commissioner

1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.

In light of the relationship between the Commissioners and Parliament, and the role to be played in the various reports made, it seems to me the Commissioners should be Officers of Parliament, and this proposition should be inserted in section 54.

Section 69 -- Confidences of the Queen's Privy Council for Canada

1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including without restricting the generality of the foregoing,

   a) memoranda the purpose of which is to present proposals or recommendations to Council;

   b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

   c) agenda of Council or records recording deliberations or decisions of Council;

   d) records used for reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

   e) records the purpose of which is to brief Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

   f) draft legislation; and

   g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

3) Subsection (1) does not apply to

a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

b) discussion papers described in paragraph (1)(b)

i) if the decisions to which the discussion papers relate have been made public, or

ii) where the decisions have not been made public, if four years have passed since the decisions were made.

This section removes entirely from the operation of the Act large quantities of government information, and should be scrutinized with the greatest caution.

There can be no quarrel with the need to provide the Federal Cabinet, the country's major political decision-making body, with the protection essential to fulfill its role. But section 69 throws too long a shadow and the review committee ought to be particularly concerned if such a wide range of records should be excluded from the law.

They should also be aware of the historical reasons for the inclusion of section 69 in the Act.

The 1979 Walter Baker Bill (C-15), which received unanimous approval at second reading, did not have such a clause, or anything closely related to it. Unfortunately, the succeeding government was involved in the result of several court decisions ordering disclosure of certain records. This persuaded it to add sections 69 and 70 respectively to proposed access and privacy legislation, in an attempt to oust the court's jurisdiction.

And yet, it was during the same general period that the acquisition of the Charter of Rights gave the courts an enormous increase in authority which, in certain circumstances, could mean the right to overrule Parliament and the Executive.

The principle of independent judicial review of a government's actions in refusing to disclose records, has, in recent years, received eminent support.

We cannot forget the decision of the United States' Supreme Court in the Richard Nixon tapes case, which, in an unanimous judgment, made it clear that the executive did not have an absolute and automatic right to withhold documents and information.

Then there was the famous UK case, where the Wilson government frantically tried to suppress the publication of the diaries of a deceased cabinet minister, Richard Crossman, because they contained references to cabinet proceedings. The court decided against the government and allowed the literary executors to publish the material.

Even closer to the issue, was the Australian case of Sankey against Gough Whitlam, a former Labour Prime Minister. Mr. Sankey sought access to government material, including some cabinet documents in support of his case. The High Court judgment required the material to be produced, saying, inter alia:

> "The question is whether the disclosure of the documents would be contrary to public interest."

This premise was well summed up in a short passage from the judgment of Chief Justice Gibbs:

> "It is in all cases the duty of the Court and not the privilege of the Executive Government to decide whether a document will be produced or may be withheld. The Court must decide which aspect of the public interest dominates."

There is a common thread running through these cases: the greatest consideration will always be given to the view of Cabinet, but in the final consideration, there must be review by an independent tribunal.

Thus, sections 69 and 70 of the respective Acts should be struck out and replaced by an exemption clause to deal with Cabinet documents.

Let us remember, if it is true that the legal title to information and records lies in the government, it is only as trustee for the people, who are the equitable owners.

While reviewing sections 69 and 70 of the respective Acts, the committee would do well to look at a related issue -- namely the alleged convention under which outgoing governments claim the right to inderdict the examination or disclosure of documents they leave behind,

which are thus kept out of reach of incoming administrations, as well as the public.

There should of course be a right to place an embargo on certain papers left by retiring ministers. But how far should this practice go? To what extent can it be extended by new administrations? And who makes the choice? Surely not deputy ministers who meet newly-appointed members of the executive to tell them what they are or are not allowed to see!

This issue is current and controversial and could conflict with the ATIP Law. I suggest the standing committee appoint a sub-committee to review the entire problem. I also suggest they could recommend any change need not be retro-active, and need only apply to future administrations.

The terms of reference of this same sub-committee could also include a review of the Official Secrets Act, and the Prerogative of Crown Privilege, both of which are to some extent also in conflict with the ATIP Law -- e.g., they inhibit the right of Parliamentary committees to call public servants as witnesses and require full production of papers.

PRIVACY ACT

I have read the reports and comments by the Privacy Commissioner and noted his concern with a number of issues, including the transfer of electronic data material, both domestically and internationally. I understand however he will likely deal with this before the committee, as well as with the extent to which there has been sharing of personal information under section 8(2) of the Privacy Act.

Section 12 -- Access to Personal Information (Right of Access)

1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the Immigration Act, 1976 has a right to and shall, on request, be given access to

   a) any personal information about the individual contained in a personal information bank; and

   b) any other personal information about the individual under the control of a government institution with respect to which the individual

is able to provide sufficient specific information on the location of the information as to render it reasonably retrievable by the government institution.

2) Every individual who is given access under paragraph (1)(a) to personal information that has been used, is being used, or is available for use for an administrative purpose is entitled to

a) request correction of the personal information where the individual believes there is an error or omission therein;

b) require that a notation be attached to the information reflecting any correction requested but not made; and

c) require that any person or body to whom such information has been disclosed for use for an administrative purpose within two years prior to the time a correction is requested or a notation is required under this subsection in respect of that information

i) be notified of the correction or notation; and

ii) where the disclosure is to a government institution, the institution make the correction or notation on any copy of the information under its control.

3) The Governor in Council may, by order, extend the right to be given access to personal information under subsection (1) to include individuals not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

An important right dealt with by the Privacy Act is that of seeking correction of government records when an individual has examined his or her personal record and found it defective (section 12(2)).

While the applicant has the right of a review by the Privacy Commissioner in this regard (Section 29(1)(c)), the matter rests there, with no further remedy.

I would urge consideration be given to extending the court's jurisdiction in section 41 of the Privacy Act, so an applicant will have a right of appeal to the court, ensuring that an order can be given directing that a personal record be rectified.

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CONCLUSION

This report earlier stated that the ATIP Law widened the civil rights of the public by outlining the right to be informed about government, and that in doing so there was a significant collateral benefit through increasing the efficiency of public servants.

There is one further advantage.

At the present time there exists a breakdown in communications between the rulers and the ruled. It is a phenomenon which has been apparent for some years, and new governments inherit the problem.

Needless to say, this breakdown vastly emphasizes the difficulties of governing.

Laws providing access to government information will not immediatley or automatically improve the relationship between the people and the executive. But if it is perceived that those in control are honest and open in their disclosure of the facts it will do much to restore the goodwill and faith between the citizens and those who govern.

The Law is here. It will not self-destruct and blow away. So the task -- and it will be a continuing one, is to use the experience of the last few years to more clearly define the public's right to know, and, at the same time, maintain the government's right to carry out its functions.

Not easy, but possible!